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LO GA LUNG

v.

DIONG CHING DIUNG

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COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
DAVID WONG DAK WAH JCA
ABANG ISKANDAR JCA
[CIVIL APPEAL NO: Q-02-2816-11-2011]

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25 APRIL 2014

MONEYLENDERS: *Moneylending transaction - Document of debt - Making of - Whether documents attested by 'officer of the court' - Whether practising advocate and solicitor an 'officer of the court' -*

D

Whether in compliance with ss. 3 and 4 of Moneylenders Ordinance - Whether non-compliance rendered debt documents null and void

CONTRACT: *Void contract - Restitution - Application for - Moneylending transaction - Whether debt documents declared void -*

E

Whether failure of fundamental substratum of application - Contracts Act 1950, s. 66

The respondent (the borrower) entered into a money-lending transaction with the appellant (the lender) in which the land titles belonging to the respondent were used to secure the borrowings.

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The transactions, as were shown in the debt documents, were attested by one Teo Chong Lee, an advocate and solicitor. The sum of money concerned had changed hands from the appellant to the respondent. However, after a lapse of 20 years, the respondent filed an originating summons challenging the propriety

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of the debt documents on the grounds that the said documents had run afoul of ss. 3 and 4 of the Moneylenders Ordinance 1951 ('the Ordinance'). The respondent alleged that the breach against s. 3 of the Ordinance arose since Teo Chong Lee, though a lawyer, was not an 'officer of the court'. It followed that the

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transfer of the physical money from the appellant to the respondent was not witnessed by a court official, in breach of s. 4 of the Ordinance. The trial judge granted the prayer in terms as prayed by the respondent. Hence, this appeal. The issues for the court's consideration were, *inter alia*: (i) whether there had

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been non-compliance of ss. 3 and 4 of the Ordinance in the sense

that the debt documents were not attested by an 'officer of the court' and the handing over of the money was not witnessed by an 'officer of the court'; (ii) whether the non-compliance rendered the debt documents null and void; and (iii) whether the appellant could pursue an order of restitution under s. 66 of the Contracts Act 1950 ('the Act'). A B

Held (allowing appeal; setting aside order of High Court)
Per Abang Iskandar JCA delivering the judgment of the court:

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(1) The phrase 'officer of the court' refers to functionaries or officers in the employment of the court registry. Teo Chong Lee, being a practising advocate and solicitor, could not be considered as an 'officer of the court' for the purpose of fulfilling the dictates of the Ordinance relating to the making out and preparation of the debt documents. In the circumstances, the transfer of the money involved in the transaction, to which the debt documents related, was not witnessed by the officer of the court upon its execution. Hence, there had been instances of non-compliance by the appellant and the trial judge had not erred in finding that there had been non-compliance of ss. 3 and 4 of the Ordinance. (para 7) D E

(2) The prohibitory effect only relates to the admissibility of the impugned documents themselves as evidence and it does not extend to justifying the court to proceed to declare the said documents as being void for any other purpose. The trial judge had misconstrued s. 3 of the Ordinance to the extent that it had the effect of rendering the documents of debt as void when in fact, s. 3 only had the limited effect of prohibiting admissibility of the impugned debt documents as evidence in court. The trial judge, by doing so, had exceeded the boundary which s. 3 had in fact and in law conferred upon her. (paras 13 & 14) F G

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(3) The ground on restitution under s. 66 of the Act could only be pursued by the appellant in the alternative in the circumstances. On the facts, the fundamental substratum for the application of s. 66 of the Act was no longer in existence, namely, there was no 'void documents' within the contemplation of the provision in relation to the debt I

documents. As such, the issue of s. 66 did not feature as a live issue for the court's due consideration and hence, no order on the issue was made. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Responden (peminjam) memasuki satu transaksi pinjaman wang dengan perayu (pemberi pinjaman) di mana hakmilik tanah kepunyaan responden digunakan untuk menjamin pinjaman-pinjaman. Transaksi tersebut, seperti yang ditunjukkan dalam dokumen-dokumen hutang, disaksikan oleh Teo Chong Lee, seorang peguambela dan peguamcara. Jumlah wang yang berkaitan bertukar tangan daripada perayu kepada responden. Walau bagaimanapun, selepas 20 tahun, responden memfailkan saman pemula mencabar kesahihan dokumen-dokumen hutang atas alasan bahawa dokumen-dokumen tersebut bertentangan dengan ss. 3 dan 4 Ordinan Pemberipinjam Wang ('Ordinan'). Responden mendakwa bahawa pelanggaran terhadap s. 3 Ordinan berbangkit kerana Teo Chong Lee, walaupun seorang peguam, bukanlah seorang 'pegawai mahkamah'. Berikutan itu, pemindahan wang secara fizikal daripada perayu kepada responden tidak disaksikan oleh pegawai mahkamah, dalam kemungkiran s. 4 Ordinan. Hakim bicara membenarkan perintah seperti yang dipohon oleh responden. Maka, rayuan ini. Isu-isu untuk pertimbangan mahkamah adalah, antara lain: (i) sama ada terdapat ketidakpatuhan ss. 3 dan 4 Ordinan di mana dokumen-dokumen hutang tidak disaksikan oleh 'pegawai mahkamah' dan pemberian wang tidak disaksikan oleh 'pegawai mahkamah'; (ii) sama ada ketidakpatuhan menyebabkan dokumen-dokumen hutang batal dan tidak sah; dan (iii) sama ada perayu boleh memohon perintah pengembalian di bawah s. 66 Akta Kontrak 1950 ('Akta').

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Frasa 'pegawai mahkamah' merujuk kepada fungsi atau pegawai-pegawai dalam tugasan pendaftaran mahkamah. Teo Chong Lee, sebagai peguambela dan peguamcara yang sedang beramal, tidak boleh dianggap sebagai 'pegawai mahkamah' bagi tujuan memenuhi keperluan Ordinan tersebut berkaitan dengan pembuatan dan penyediaan dokumen-dokumen hutang.

Dalam keadaan tersebut, pemindahan wang yang terlibat dalam transaksi, yang mana dokumen-dokumen hutang berkait, tidak disaksikan oleh pegawai mahkamah semasa dimeterai. Dengan itu, wujud ketidakpatuhan oleh perayu dan hakim bicara tidak khilaf dalam mendapati bahawa terdapat ketidakpatuhan ss. 3 dan 4 Ordinan.

(2) Kesan larangan hanya berkait dengan kebolehterimaan dokumen-dokumen yang dipersoalkan itu sendiri sebagai keterangan dan ia tidak boleh dilanjutkan untuk memberikan justifikasi kepada mahkamah meneruskan untuk mengisytiharkan bahawa dokumen-dokumen tersebut adalah batal bagi apa-apa tujuan lain. Hakim bicara telah tersalah tafsir s. 3 Ordinan sehingga memutuskan bahawa ia mempunyai kesan yang menyebabkan dokumen-dokumen hutang tersebut batal apabila pada hakikatnya, s. 3 hanya mempunyai kesan terhad melarang kebolehterimaan dokumen-dokumen hutang yang dipersoalkan sebagai keterangan di mahkamah. Hakim bicara, dengan berbuat demikian telah melampaui had yang diberikan kepadanya oleh s. 3 telah, dari segi fakta dan undang-undang.

(3) Alasan untuk pengembalian di bawah s. 66 Akta hanya boleh diteruskan oleh perayu secara alternatif dalam keadaan tersebut. Di atas fakta substratum asas bagi pemakaian s. 66 tidak lagi wujud, iaitu tidak ada 'dokumen-dokumen batal' dalam rangkuman peruntukan tersebut berkaitan dengan dokumen-dokumen hutang tersebut. Oleh itu, isu s. 66 tidak menunjukkan isu sebenar untuk dipertimbangkan oleh mahkamah dan dengan itu, tiada perintah atas isu tersebut dibuat.

Case(s) referred to:

Karpal Singh v. Atip Ali [1986] 2 CLJ 419; [1986] CLJ (Rep) 168 SC ***(dist)***

Phuman Singh v. Kho Kwang Choon [1965] 1 LNS 132 FC ***(foll)***

Raja Segaran Krishnan v. Bar Council & Ors [2000] 1 MLJ 1 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 66

Moneylenders Ordinance (Cap 114) (Sarawak), ss. 3, 4

For the appellant - George Lim; M/s Battenberg & Talma, Advoc

For the respondent - Augustine Liom; M/s Tang & Co, Advocs

[Appeal from High Court, Sibu; Originating Summons No: SB-24-4-2011]

Reported by S Barathi

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JUDGMENT

Abang Iskandar JCA:

[1] This has been an appeal emanating from the High Court sitting in Sibu, Sarawak. It concerned an originating summons ('the OS') filed by the respondent (borrower) who had sought a declaration from the High Court that the debt documents that were generated with regard to the money-lending transactions between him and the appellant (lender) be declared as null and void and that the land titles belonging to him, that were used to secure the borrowings be returned back to him. Suffice to state here that certain specific provisions as contained in the Moneylenders Ordinance (Cap 114) were cited in support of the borrower's OS.

[2] The learned trial judge, having heard and considered the OS had granted the prayers in terms as prayed for by the respondent. The aggrieved lender had since filed an appeal against that order by the learned trial judge. Hence that had accounted for the hearing of this appeal before us. We had occasion to hear the appeal and had considered the submissions put forth by both learned counsels. Having done that, we had allowed the appeal by the moneylender appellant. We now proffer our reasons for so deciding in his favour.

[3] To begin, a brief look at the facts would be useful. It would appear that the impugned transactions had taken place many years ago. In fact they were affected in last century, back in 1990/1991 to be exact. The transactions, as were shown in the debt documents, were attested by one Teo Chong Lee esquire, advocate and solicitor, having his legal practice in Sibu, Sarawak at the material time. Nothing seemed to be amiss during that time. The sum of money concerned in the transactions to which the documents of debts related, had indeed changed hands from the appellant to the respondent. This factual circumstance was not disputed between the parties. Everything went on fine, until one day after 20 years down the road, the respondent borrower had run to the Sibu High Court with his OS seeking for the above-stated prayers. A look at the OS had shown that the respondent was now challenging the propriety of the debt documents on the ground that the said documents had run afoul of ss. 3 and 4 of the Moneylenders Ordinance ('Cap 114'). Sections 3 and 4 of the Moneylenders Ordinance are now reproduced as below:

Section 3

[1] Every document of debt of whatsoever nature entered into with a registered Moneylender shall be made out and registered in court, and any such document not complying with this Ordinance shall not be accepted as evidence in court.

[2] No unregistered moneylender shall make out a document of debt in court.

Section 4

At the time a document of debt, is signed by the borrower, the officer attesting such document shall, if a cash loan, see that the full amount set forth therein is paid over in his presence by the lender to the borrower or, if the consideration be other than cash, satisfy himself that the borrower has received full value for the amount set forth in the document.

[4] The ambit of s. 3 of the Moneylenders Ordinance had been discussed in the case of *Phuman Singh v. Kho Kwang Choon* [1965] 1 LNS 132; [1965] 2 MLJ 189 ('the *Phuman Singh* case') and it was there held by Wylie CJ (Borneo) that it would appear that the preparation of the debt documents in the context of it being 'made out' must refer to the actual preparation of the said documents and not merely its execution. The learned Chief Justice then went on to state that the Ordinance "does require the actual document to be prepared before the appropriate officer of the court." As such, the preparation of the documents must be done or 'made out' in court by the appropriate 'officer of the court'.

[5] On the facts of this immediate case before us, the fact that the debt documents now under scrutiny was not made out in court was not disputed.

[6] The other alleged breach against s. 3 was because the said Teo Chong Lee, though a lawyer, was not an 'officer of the court.' The alleged breach against s. 4 was because the transfer of the physical money from the lender to the respondent was not witnessed by a court official as stipulated therein.

[7] We had heard and considered the submissions placed before us in the course of the appeal and having considered the same, we noted that both learned counsel had appropriately referred us to the case *Phuman Singh v. Kho Kwang Choon* [1965] 1 LNS

A 132; [1965] 2 MLJ 189 ('the *Phuman Singh* case'). At the outset, from the consideration of the materials placed before the trial judge, we were of the view that she had not erred when she found that there had been non-compliances of ss. 3 and 4 of the Moneylenders Ordinance in the sense that the debt documents
B were not attested by an 'officer of the court' and that the handing over of the money from the lender to the borrower was not witnessed by an 'officer of the court' as well, as was contemplated under s. 4 therein. With regard to the 'officer of the court' issue, there was an attempt by Mr George Lim, the learned counsel for
C the appellant lender, who contended that a practising advocate and solicitor could qualify as an 'officer of the court' for the purpose of fulfilling the dictates of relevant provisions of the sections under review. We are of the view that the case of *Raja Sekaran Krishnan v. Bar Council & Ors* [2000] 1 MLJ 1 could not
D be used as an authority for the proposition that was being advanced before her by the learned counsel for the lender. In the *Raja Sekaran* case *(supra)* the phrase that was being scrutinised by the court there had been "officer of the court" as was the case in the Supreme Court case of *Karpal Singh v. Atip bin Ali* [1986]
E 2 CLJ 419; [1986] CLJ (Rep) 168; [1987] 1 MLJ 291 where the counsel's conduct in court was under the supervision of the court before whom he was appearing when conducting a court proceeding. In the scheme of things, the learned trial judge was correct when she had ruled that the phrase 'officer of the court'
F referred to by Chief Justice Wylie (Borneo) in the *Phuman Singh* case *(supra)* would not include a practising advocate and solicitor such as Mr Teo Chong Lee. The phrase refers to the functionaries or officers in the employment of the court registry and the like. Mr Teo Chong Lee, being a practising advocate at
G the material times, was not one such person who could, by any stretch of imagination, be considered as such 'officer of the court' for the purpose of fulfilling the dictates of the Moneylenders Ordinance relating to the making out and preparation of the debt documents. He may well fall within the phase 'officer of the court'
H in other legislations, but he was never an officer of the court within the specific purview of the Moneylenders Ordinance (Cap 114). On the facts as well, the transfer of the money involved in the transaction to which the debt documents related was not witnessed by the officer of the court upon its execution. Based on
I that premise, there had been instances of non-compliance by the appellant lender and the learned trial judge was correct in concluding as she did on those issues as raised before her.

[8] But having said that, the next question that begged an answer was whether such non-compliances by the lender with regard to the three debt documents would render them null and void by virtue of ss. 3 and 4 of the Moneylenders Ordinance (Cap 114).

[9] To our mind, this *Phuman Singh* case *(supra)* had stated the position of the law on the meaning and intent of ss. 3 and 4 of the Moneylenders Ordinance, quite clearly. From a perusal of the decision in the *Phuman Singh* case *(supra)* in particular, the speech of Wylie CJ (Borneo), two things had been clear in relation to the licensed moneylending activities. One has been that the respective positions of the Land Code and the Moneylenders Ordinance, seen in their in proper context. We reproduce below the relevant excerpt of His Lordship Wylie's speech that is found at p. 194B to E of the report below, for ease of convenience:

> The relevant part of the Land Code provides for a system of registration of land based on the Torrens system and the object is to establish and maintain an up-to-date register of land ownership and dealings with special emphasis on the fact that the register is paramount in regard to interests in land. Consequently, once a person is registered as proprietor of an interest in land (be he a registered moneylender or not) he is in a very strong position in regard to that interest.
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> The object of the Moneylenders Ordinance is to control the dealings of moneylenders with special emphasis on protection of the borrower in regard to transactions that may be considered harsh or unconscionable. There is no conflict between the objects of the two sets of legislation, but there is nothing in the Land Code, which would tend to control the activities of moneylenders, especially in the manner envisaged in ss. 3 and 4 of the Ordinance.

[10] On the facts of the present case, there was no evidence that the appellant had applied for foreclosure proceedings. It was the respondent who had run to the High Court, twenty years after the debts documents (comprising the three relevant charge documents as security for the loan amounts) were registered with the Lands and Surveys Office in Sibu, alleging that the same debt documents were not 'made out in court'. That had accounted for his OS that had sought the High Court in Sibu to declare the said documents to be void because they were not made out in

court, relying on ss. 3 and 4 of the Moneylenders Ordinance (Sarawak). Part of the admitted facts had shown that the respondent had received the monies from the appellant under the now impugned documents to the fullest and had not repaid to the appellant lender, a single cent.

[11] To recap, the learned trial judge had agreed with Mr Augustine Liom, learned counsel for the respondent on the ground that as the debt documents were not made in compliance with the said ss. 3 and 4 of the Moneylenders Ordinance. As such, in her penultimate order, they were thus invalid and could not be relied upon to foreclose the land and that as such, "there was nothing to hold on to the land which was registered in the Land Office. The defective documents of debts were void *ab initio*. Hence void *ab initio*." She then had gone on to declare the debt documents as void and ordered the appellant to return the document of titles respecting the said land to the respondent, as can be seen at p. 21 of the record of appeal (Part A, Part B and Part C).

[12] At this juncture, it would be pertinent to refer to the other portion of Wylie CJ's speech in the *Phuman Singh* case *(supra)* at p. 194 A-E in the report and which reads like so:

> In the present instance there was no compliance with s. 3 and 4 of the Ordinance. Section 3 could not be complied with by means of the late registration that was affected, because by that time it was impossible to have the document of debt prepared before an officer of the Court. *In consequence, these charges may not be "accepted as evidence in Court", to quote the language of s. 3 of the Ordinance.*
>
> To determine the effect of this prohibition, some consideration must be given to its precise meaning. *The Ordinance nowhere declares a money lending contract to be unenforceable as provided for in some sections of the Moneylenders Ordinance, 1951, of Malaya, although s. 5 does provide for relief and taking of account, if a transaction is considered by a Court to be harsh and unconscionable.* As already observed, much comment could be passed on the unusual language of the Ordinance, and, in consequence of this unusual language, little assistance in interpreting it can be obtained from any authorities. I have already referred to the objects of this legislation. These would justify an interpretation wide enough to secure these objects, *but I find difficulty in giving any extended meaning to this language, because I cannot find in the Ordinance itself anything which would assist me in determining the limits to give to an*

> *extended meaning.* Consequently, the only principle I feel justified in applying is the basic principle that language used in an enactment should be given its ordinary meaning in the absence of any ambiguity or difficulty in following that course. I see nothing ambiguous in this expression and no difficulty in applying it in the present proceedings, although the provision may be unusual when compared with similar legislation elsewhere. *In my judgment, the only effect is that the document of debt is not to be admitted as evidence, and the section has no other direct effect on the transaction. Consequently, the contract remains enforceable, if this can be affected without having to produce the document of debt.* (emphasis added).

[13] On the facts of the case before their Lordships in the *Phuman Singh* case *(supra)*, Wylie CJ (Borneo), with whom learned justice Tan Ah Tah FJ had also agreed, had concluded as follows: "Consequently, the prohibition on the acceptance of the charges as evidence in court effectively prevents this application (by the lender) from succeeding *in the state of the evidence in these proceedings*." (emphasis added). It is clearly to be noted that the prohibitory effect only relates to the *admissibility of the impugned documents* themselves as evidence and it *does not extend to justifying the court to proceed to declare* the said documents as being void for any other purpose. Indeed, the contract remains enforceable, if this can be affected without having to produce the documents of debt.

[14] As such, we were in agreement with the learned counsel for the appellant that the learned trial judge had misconstrued s. 3 of the Moneylenders Ordinance to the extent that it had the effect of rendering the documents of debt as void when in fact, that s. 3 only had the limited effect of prohibiting admissibility of the impugned debt documents as evidence in court. By so doing she had exceeded the boundary which s. 3 had in fact and in law conferred upon her. We agreed with Mr George Lim, that on that score alone, this appeal ought to succeed and we had so held.

[15] There was the other issue that had pertained to s. 66 of the Contracts Act 1950. The lender appellant had, *via* his affidavit-in-opposition to the borrower respondent's OS for the declaratory orders, applied to the High Court to invoke its discretion to make an order of restitution under s. 66 Contracts Act in favour of the lender because the respondent had been unjustly enriched at the lender's expense, in the circumstances of this case. The learned trial judge had dealt with the matter in this manner, under the miscellaneous issues, as follows:

Miscellaneous Issues

13. Mr. Lim contended that the Plaintiff had for the past twenty years enjoyed the full use of the money and does not even pay the interest promised. It was submitted that if the document of debts are declared void, the court can order the Plaintiff to refund the loan money with interest under section 66 of the Contract Act 1950 since the Plaintiff has received the full advantage under the void document.

14. Suffice it to say that there was no application by the Defendant for recovery of the loan money. The issue on application of section 66 is not within the purview and ambit of this application. Thus, not much need be said on the applicability of this section to the present action.

[16] It is clear to our mind that the issue on s. 66 was one that was predicated on the supposition that it ought to be addressed by the trial judge only if the debt documents were declared as void. But she had not made that the order that was sought by the appellant lender because 'the application of s. 66 is not within the purview and ambit of this application (being the OS)'.

[17] Be that as it may, since we had allowed the appellant's appeal against the learned trial judge's order that had declared the documents of debt as being null and void, we therefore are of the considered and respectful view that there does not exist now the fundamental substratum for the application of s. 66 of the Contracts Act, namely there is no 'void documents' within the contemplation of that provision, in relation to the debt documents. As such, the issue of s. 66 Contracts Act did not feature as a live issue before us for our due consideration, one way or another. The way we saw it, as we had earlier indicated, this ground on restitution under s. 66 of the Contracts Act could only be pursued by the appellant in the alternative in the circumstances. With respect, the appellant cannot have it both ways. In the circumstances, having made the above observation, we made no order on the issue of restitution under s. 66 of the Contracts Act 1950.

[18] In the upshot, this appeal was allowed by us and the orders made by the learned trial judge allowing the prayers in the respondent's OS were set aside. We had awarded costs to the appellant here and below in the sum of RM20,000. We had further ordered the deposit to be refunded to the appellant.